IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 338 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

VIRA KHETA GARVA

Appearance:

1. Criminal Appeal No. 338 of 1986

PMr K C Shah, APP for Petitioner No. 1

MR MC BAROT for Respondent No. 1

MR RG CHHARA for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 28/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

The State of Gujarat has preferred this appeal under section 378 of the Code of Criminal Procedure, 1973, challenging the judgment and acquittal order dated 20.12.1985 recorded in Sessions Case No.6/85 by the learned Sessions Judge, Kachchh, Bhuj acquitting the present respondent from offences punishable under section 302 of IPC as well as for offence punishable under sub-section (1) of section 37 read with section 135 of the Bombay Police Act. The facts of the case of the prosecution before the trial court may be briefly stated as follows:

2. Police Constable Chandrasinh, PW 4 - Exh.19 was posted on duty at Samakhyali, near petrol pump from 5 p.m. to 8 a.m. On the next day, i.e. on 18.11.1984. According to his version, when he was on duty near Samakhyali bus stand, he was told by deceased Hussain Alarakha that a person in drunken condition, was quarelling on the public road. Therefore, he went to the said place with the deceased and he actually caught hold of the said person, whose name was Hari and who happened to be the son of the present respondent. The said person was, according to the case of the said Head Constable, in drunken condition and he was speaking abusive words. Therefore, Hari was arrested and he was to be taken to the police station and thus, the Head Constable was on the way to the bus station in search of a vehicle in which Hari could be taken to the police station. At that time, the present respondent came to the spot and dealt three to four stick blows on the head of the deceased. That it was at about 7.30 p.m. That at that time, Dayaram Popatdas was also present there. That on account of the said injury, deceased Hussain fell on the ground and became unconscious. Thereafter, he was taken to Aaghoi police station in a taxi car in the company of Dayaram Popatdas and the arrested person Hari. Thereafter, FIR was filed against accused Hari for the offence punishable under the Bombay Police Act, 1949 and separate FIR was filed in respect of the injuries sustained by the deceased and thereafter, the deceased was sent for medical examination and treatment to the Lakhadia dispensary with police yadi. However, at that time, the deceased was not in a position to speak as he was unconscious. Thereafter, he needed further treatment and, therefore, he was sent to the dispensary at Bhachau. That, there the name of the son of the respondent was stated by him as Vira Maharaj but later on it was learnt

that his original name was Vira Kheta. Therefore, the said fact was also placed on record. Thereafter, the deceased died and hence offence punishable under section 302 of IPC was also registered against the respondent. Investigation was undertaken, charge sheet was filed and since the offence under section 302 of IPC was exclusively triable by the court of Sessions, the case against the respondent was committed to the Court of Sessions. The learned Sessions Judge supplied copies of police investigation papers to the respondent and charge was framed. The respondent pleaded not guilty and, therefore, evidence was recorded and at the end of the evidence, further statement of the respondent was recorded under section 313 of the Criminal Procedure Code. After hearing the arguments, the learned Judge found that the prosecution had failed to prove the case against the respondent and thereafter, the learned Judge pronounced the judgment acquitting the respondent.

3. Feeling aggrieved by the said judgment and acquittal order of the trial court, the State has preferred this appeal before this Court. The State has contended before this court that there was sufficient evidence and other material in order to hold the respondent guilty for offence under section 302 of IPC and that the trial court has committed serious error and illegality in not convicting the respondent and therefore, the judgment and acquittal order are illegal and erroneous and deserve to be set aside. The State has, therefore, prayed that the present appeal be allowed, the judgment and acquittal order against the respondent be set aside and the respondent be held guilty for offence under section 302 of IPC and he may be sentenced in accordance with law.

4. On receipt of the appeal, leave was granted and appeal was admitted and bailable warrant was issued against the respondent. At the final hearing, Mr K C Shah, learned APP appeared on behalf of the State whereas Mr M C Barot, learned Advocate has appeared on behalf of the respondent. Both of them have taken us through the entire evidence and the observations made by the trial court during the course of the judgment.

5. As said above, it was the case of the prosecution before the trial court that when Head Constable, Chandrasinh was on duty in village Samakhyali he was informed that a person was misbehaving in a public place in a drunken stage. The Head Constable rushed to the spot and arrested the said person. In the meantime, the present respondent came to the spot and dealt stick blows

on the head of the deceased, who subsequently died on account of the injuries sustained by him as above. In above view of the matter, it would be necessary for us to consider the evidence on record. In fact, four witnesses have been examined as eye witnesses. PW 4 - Exh.19, Chandrasinh is the informant and he is a police head constable also. His evidence is in accordance with the story narrated hereinabove. According to his evidence, the respondent rushed to the spot and at that time the deceased was in his custody. That the respondent dealt three to four stick blows on the head of the deceased and, therefore, he fell down and at that time, one Dayaram Popatdas was present there to witness the event. It is also his case that the said witness Dayaram Popatdas had accompanied the informant with the deceased to the police station at Aaghoi where they had gone in a taxi car.

6. Then we can turn to the evidence of Dayaram Popatdas, who has been examined as PW 1 at Exh.6. According to his evidence, he had gone to the spot on hearing the shouts. That at that time, the deceased was lying on the road and other 5 to 6 persons were also there. It would be important to note that this witness has not said that he had seen the respondent beating the deceased. When he says that the deceased was lying on the road at the time when he had reached there, it would indirectly mean that the incident of hitting and beating was over when he reached the spot. Then, he could not be an eye witness to the event.

7. It is also his evidence that when he reached the spot, he had seen the respondent standing there. This is also little doubtful because once he reached the spot after the hitting and beating was over, it was not necessary for this respondent to continue to stay there. It is more so when the Head Constable Chandrasinh at exh.19 does not say that the respondent continued to stay there for a long time. On the contrary, in para 4 of his evidence at page 28, he has stated that when he reached the place of the incident, the respondent, after giving stick blow on the head of the deceased, disappeared inside the babul trees. On the one hand this witness does not appear to be an eye witness. On the other hand, his evidence that the respondent continued to stay there when he reached there appears to be doubtful. It is more so, when the Head Constable Chandrasinh at Exh.19 has clearly stated that at the time of the incident, Dayaram was present there. This shows that according to the evidence of the head constable, Dayaram was an eye witness whereas according to the evidence of Dayaram

Popatdas, he had reached the spot after the incident was over. Therefore, there is apparent contradiction between the evidence of the two witnesses.

8. Then we can turn to the third eye witness. He also happened to be Dayaram i.e. Dayaram Shambhu, P.W. 2, at Exh.7. According to his evidence, at about 7 p.m. on the evening of the incident when he was on his way to his house, he had heard shouts near the dispensary of Dr.Khandelwal and on hearing the shouts, he reached the spot and he saw the respondent beating the deceased with a big thick wooden stick (dhoka). It would be important to note that in para 2 of his evidence, this witness has stated that he had caught hold of the respondents. This fact has not been disclosed by the two other eye witnesses referred to hereinabove. Moreover, the witness has not disclosed the names of the other eye witness Dayaram Popatdas. The witness has further stated that he tried to snatch away the wooden stick from the hands of the respondent but the respondent ran away with the stick. This fact has also not been narrated by the two other eye witnesses referred to hereinabove.

9. The fourth eye witness, PW 3 - Umar Osman at Exh.8, at page 22, has deposed before the trial court that the incident took place at about 7 p.m. and he was on his way to his residence when the incident took place near the dispensary of Dr. Khandelwal. That Hari, son of the respondent was caught by Head Constable Chandrasinh. That the respondent rushed to the spot and told the deceased that the deceased was responsible for getting arrested his son Hari. That while saying so, the respondent dealt stick blows on the head of the deceased. It is important to note that as per the description, the weapon used in the said offence, as seen by this witness, was a stick covered by leather and there were iron rings attached to the said weapon. This again is a new fact which has not come on record during the course of the evidence of three earlier eye witnesses. The witness has also stated that after beating the deceased, the respondent continued to stay there. This evidence is in contradiction with the evidence of Chandrasinh, the Head Constable. Moreover, it would not be probable that the respondent would continue to stay there after beating the deceased. It is more so, when the deceased had fallen on the ground and had become unconscious. So far as the raising of shouts is concerned, Head Constable Chandrasinh had not deposed during the course of his evidence that there was hue and cry and that attracted other persons to the spot. It is also required to be considered that though the witness has stated before the

court that he had tried to snatch away the wooden stick, this fact has not been deposed before the police during the course of his statement at the investigation stage under section 161 of the Criminal Procedure Code. Therefore, there is some sort of contradiction between the evidence given before the police and the statement given by the witness before the court at the investigation stage under section 161 of the Code. It is also important to note that this witness has deposed in para 9 of his evidence that the deceased was not beaten by anybody after he has fallen down on the road. As against this, informant Chandrasinh, Head Constable, in para 15 of his evidence, deposed that the respondent had dealt two stick blows on the deceased after he had fallen on the road. Therefore, there is again contradictory version on this aspect of the case. The said Head Constable also deposed that Dayaram Popatdas was with him right from the arrest of Hari, the son of the respondent. Dayaram has given a different version on the point. It shows that there are apparent contradictions between the versions given by the witnesses during the course of their evidence. Then, we can turn to the medical evidence in order to ascertain as to whether the medical evidence supports the evidence of all the eye witnesses.

10. Dr.Vinod Chhaganlal, PW 11 - Exh.39 is a Medical Officer of Bhachau Government dispensary, who had examined the deceased on 18.11.1984. He has stated in his evidence that when he examined the deceased, he was conscious and he was able to speak. The said Doctor has noticed the following injuries on the person of the deceased:

"(1) 1 CLW 4cm x 3 cm skin deep on the right side of the head
(2) 1 CLW 1 cm x 1 cm. skin deep near left eye. There was swelling on the right eye."

11. This witness has further stated that the patient was vomitting and he had taken stitches on the aforesaid two injuries and he was admitted and shifted to the General Ward.

12. The above fact clearly shows that the deceased had only two injuries on his person. It is also required to consider that out of the two, one injury was reported on the right side of the head and the second was on the left side of the eye. Head Constable Chandrasinh has stated that 4 blows were hit on the person of the deceased and according to him all the injuries were

inflicted on the head of the deceased. The first injury was on the right side of the head and the second was by the side of the left eye. Even other witnesses have also stated that the respondent had dealt 3 to 4 stick blows on the deceased. All the witnesses stand contradicted by the evidence of the Medical Officer at Exh.39.

13. Neither the witness nor the prosecution has come out with any explanation as to why the injuries described by the Medical Officer are not found to be the same as the injuries described by the eye witness. This would indirectly show that the witnesses have not given true version of the event or that at least they did not tell the whole truth before the trial court. We can turn to the evidence of Dr. Ramji Keshrani, PW 9 at Exh.30 who had performed post mortem in respect of the dead body of the deceased who had also noticed one injury on the left eye and second one above the left limb, the third injury was noticed right in the parietal region. Any way, the evidence of the Medical Officer and the evidence of the eye witnesses shows that there are some contradictory versions given by the eye witnesses. These contradictory versions can be said to be proved by the evidence of witnesses including the eye witnesses and the Medical Officer. In fact, the learned Advocate for the respondent who appeared before the trial court appears to have submitted detailed written arguments which can be gathered at page No.77 which is extended upto page no.117. It is also required to consider that PW 2 Dayaram Shambhu, at Exh.7 at page 17 has stated during the course of his evidence at para 14 that he caught hold of the respondent and had dragged him upto a distance of 20 ft. Thereafter he left him alone. Now this fact is totally a new one and it has not been so stated by any one witness. Moreover, if the respondent was dragged upto 20 ft. then there would be some injury on his person or his clothes may be torn in the said process. However, it does not appear from the record that the clothes of the respondent were torn or there were some injuries on the person of the respondent. It is also required to be considered that the deceased was conscious at the dispensary as per the evidence of Doctor. It seems that his statement was not recorded either by the police or by the doctor. Therefore, the most material version which could come out from the mouth of the deceased has not come on record. Such a statement would have ultimately come out as the dying declaration of the deceased and it would have been very much useful for the just decision in the case. Non-recording of the statement or case history prepared by the Doctor or police has seriously prejudiced the case of the

respondent. It is not explained as to why the statement of the deceased was not recorded either by the Doctor or by the police. It is true that the Head Constable Chandrasinh stated at one place that the deceased had become unconscious. Nevertheless after he had become unconscious, he was taken to the hospital and treated, stitches were taken and after passage of time, he may have become conscious again. It was the duty of the Medical Officer as well as of the police officer to record the statement of the deceased. This has not happened and this has seriously prejudiced the defence of the respondent. The above facts show that the witnesses have given contradictory versions and, their evidence is in contradiction with the medical evidence also. It is not much in dispute that the place of offence is surrounded by other residential houses and, therefore, other witnesses could also be present there. The witnesses have stated that there were many other persons rushed to the spot but no other witness has been examined. The prosecution examined those four eye witnesses whose evidence is, in fact, doubtful in view of the contradictory versions given by them. The trial court has mainly depended upon the contradictory version given by the witnesses and their contradictions with the medical evidence on record. In that view of the matter, it cannot be said that the trial court has committed illegality in acquitting the respondent. After all, this court is dealing with an acquittal appeal of the State. Even if two views are possible, it would not be open to this Court to substitute its views for the views adopted by the trial court. The trial court had an opportunity to witness the demeanor of the witnesses when they tendered evidence from the witness box. Moreover, it is a settled principle of law that this court should be slow in interfering with acquittal appeals. Considering the well known principles of dealing with acquittal appeals, we are of the opinion that this is not a case wherein the ultimate conclusion would be only to acquit the respondent but it is not possible for us to say that the trial court has committed illegality in acquitting the respondent of the offence in question. In this connection, learned Advocate for the respondent has shown a judgment in the case of Anil Kumar V. State of Punjab, reported in (2000) 9 SCC 455. There the Hon'ble the Supreme Court found that the testimony given by the prosecution witness was not free from doubt, that there were material omissions in statement made under section 161 of the Code of Criminal Procedure as against the evidence given by the witness before the trial court. There the concerned High Court, without examining the reasons given by the trial court for acquitting the

accused persons, set aside the acquittal order of the trial court. In the present case, we find that the trial court has given cogent reasons for acquitting the reasons. The learned APP has not been able to dislodge those reasons and findings of the trial court. In that view of the matter, we find that this is not a fit case to reverse the findings recorded by the trial court.

14. We may also refer to a decision in the case of Ramesh Babulal Doshi v. State of Gujarat, reported in AIR 1996 SC 2035. There it has been observed that the Hon'ble Supreme Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence, cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusions that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. That while sitting in judgment over an acquittal appeal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. That if the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. That on the other hand, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can then and then only reappraise the evidence to arrive at its own conclusions. In the present case, we find that the trial court has given cogent reasons for not acting upon the evidence tendered upon by the witnesses and looking to the way the evidence has been tendered and looking to the way the contradictions have been found on record and looking to the fact that the oral evidence stands contradicted by the medical evidence, this is not a fit case for interfering with the acquittal order recorded by the trial court.

15. For the foregoing reasons, we are of the view that there is no merit in the present appeal and accordingly it deserves to be dismissed. The appeal is, therefore, ordered to be dismissed. The judgment and acquittal order of the trial court are confirmed. The respondent is on bail and, therefore, his bail bonds are cancelled and the surety stands discharged.

28.4.2003 [D P Buch, J.]

[H H Mehta, J.]

msp